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JAMES H. McKENNEY,
Clerk

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## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. ~~306~~ 159.

CHARLES T. BARNEY,
Appellant,

AGAINST

THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, SETH LOW, EDWARD M. GROUT, MORRIS K. JESUP, ALEXANDER E. ORR, JOHN H. STARIN, WOODBURY LANGDON, CHARLES S. SMITH and JOHN CLAFLIN, as Commissioners of Rapid Transit, JOHN B. McDONALD and MAY L. SHALER, as Administratrix of the Estate of Ira A. Shaler, deceased,
Appellees.

Now comes Charles T. Barney, the appellant in the above-entitled cause, by Arthur H. Masten and Maxwell Evarts, his counsel, and moves the Court to advance the above-entitled cause in accordance with Rule 32 of the Rules of the

Supreme Court of the United States, upon the ground that the only question at issue therein is the question of the jurisdiction of the Court below, viz.: the Circuit Court of the United States for the Southern District of New York.

The appellant further moves this Court, for the reasons stated in the memorandum filed herewith, for leave to orally argue said cause.

If the Court should for any reason deem it undesirable to grant the motion to orally present this cause, then the appellant asks that the cause should not be advanced.

ARTHUR H. MASTEN,
MAXWELL EVARTS,
*Of Counsel for the Appellant.*

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 906. 159

CHARLES T. BARNEY,
Appellant,

AGAINST

THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, SETH LOW, EDWARD M. GROUT, MORRIS K. JESUP, ALEXANDER E. ORR, JOHN H. STARIN, WOODBURY LANGDON, CHARLES S. SMITH and JOHN CLAFLIN, as Commissioners of Rapid Transit; JOHN B. McDONALD and MAY L. SHALER, as Administratrix of the Estate of Ira A. Shaler, deceased,
Appellees.

## MEMORANDUM IN SUPPORT OF MOTION TO ADVANCE CAUSE FOR ORAL ARGUMENT.

By the Rapid Transit Act, passed by the Legislature of the State of New York in 1891 (Chap. 4 of the Laws of New York of 1891), the

appellees, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, William S. Smith and John Claflin, were designated and appointed Commissioners of Rapid Transit and were given power and authority, and the duty was imposed upon them by said act, to determine and establish the route and general plan of a subway in the city of New York and to build and construct the same.

By section 18 of Article 3 of the Constitution of the State of New York, it is provided as follows:

> "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall de-

termine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

In pursuance of the powers conferred upon them by the Rapid Transit Act the Commissioners aforesaid determined upon a plan of construction of a subway in the City of New York to which the appellant gave his written consent. The Commissioners of Rapid Transit were however unable to obtain the consent of the owners of one-half in value of the property on Park Avenue as required by the provision of the Constitution of the State of New York above referred to, and as also required by the provisions of the Rapid Transit Act, and in lieu thereof under the provisions of said act they submitted a plan of construction to the authorities of the City of New York and to the Appellate Division of the Supreme Court of the State of New York for the First Department, by which it was provided that the portion of the subway through Park Avenue between 34th and 42d Streets, should be built in such a manner that the exterior surface

of the easterly wall of said tunnel should be 37 feet and 6 inches from the building line of the houses on the east side of Park Avenue. This plan of construction was approved by the Court and the city authorities and was the plan to which the appellant had given his written consent.

In March, 1902, the foundations of many of the houses on the east side of Park Avenue, between 37th and 38th Street gave way and the houses began to slide into the subway, and it was then learned for the first time that the tunnel as being constructed was unauthorized and was not being built in accordance with the general plan of construction approved by the Appellate Division as aforesaid, and consented to by the appellant, and that the easterly wall of said tunnel instead of being 37 feet and 6 inches from the building line of the houses on the east side of Park Avenue was within 7 feet thereof.

The appellant is the owner of the house No. 101 East 38th Street, being on the northeast corner of Park Avenue and 38th Street. Upon ascertaining the cause of the destruction of the houses on the adjoining block the appellant brought this suit in the Circuit Court of the

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United States for the Southern District of New York, and applied for an injunction to prevent a further construction of the subway in the unauthorized route, to compel a filling in of the tunnel as improperly constructed and to recover the damages sustained by him. The jurisdiction of the Court below was claimed by the appellant upon the ground that the defendants had been specifically named in the Rapid Transit Act and had been thereby clothed by the Legislature of the State of New York with the power and duty of constructing the subway and that therefore whatever they did to carry out and perform the duty imposed upon them by the State was the act of the State and that his house and the easements in his property adjoining the tunnel were being taken from him by them without just compensation, and therefore in violation of the Fourteenth Amendment of the Constitution of the United States which provides that a State cannot deprive a person of his property without due process of law.

The Court below found the tunnel as constructed to be illegal and without authority of law, but denied the application for an injunction and dismissed the cause for want of jurisdiction

upon the ground that the unauthorized construction of the tunnel by the Rapid Transit Commissioners was not an act of the State of New York, but was the act of the appellees in their character of private individuals and as trespassers. In other words, the Court held that the acts of the Commissioners in building the tunnel in an authorized manner and in accordance with the plan approved by the Appellate Division were the acts of the State of New York, but that the moment they constructed the tunnel in an unauthorized and improper manner, that then they ceased to be clothed with the power and authority of the State, assumed their characters as individuals and became trespassers. In the opinion of the Court, reported in 118 Fed. Rep., 683, it was said as follows at pp. 686, 687:

> " Now, in the case at bar, the first question to be considered is whether the state, through its legislature, has given or undertaken to give authority to the rapid transit commissioners to construct this eastern tunnel, which is the thing complained of. If the legislature had merely selected the streets and avenues, and left it to the commissioners to determine whereabouts therein

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the tunnel should be located, the action of the commissioners would be the action of the state. But it did no such thing. It carefully provided for notice and hearing and consents, for the various steps which make up what is understood to be 'due process of law,' all to be carried on to a conclusion which should determine upon a route and general plan sufficiently detailed to show the 'extent to which any avenue is to be encroached upon and the property abutting thereon affected.' Upon such route only, and under such plan only, is any authority to construct conferred by the state on the defendants or any of them. *When they depart from such plan, whatever trespass they may commit upon private rights is one which the state has not only not authorized them to commit, but under any fair interpretation of the rapid transit act has forbidden them to commit.*"

The question presented is a novel one of importance never directly determined by this Court. Is a person whose property is being taken from him in violation of the provisions of the Constitution of the United States by persons clothed with the power of a State by an act of the Legislature precluded from seeking the jurisdiction of

a Federal Court upon the theory that such appointees of the State acted as individuals when they undertook to perform in an unauthorized manner the duty imposed upon them by the State?

In the case of Chicago, Burlington & Quincy Railroad Co. vs. Chicago, 166 U. S., 226, it was said at page 233:

> "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.'"

In the case of Railroad and Telephone Companies vs. Board, 85 Fed. Rep., 302, 317, it was said as follows:

"We have here a serious contention that a constitutional guaranty has been denied to these plaintiffs, and, if such is the case, it would seem to be equally a deprivation of a right secured by the fourteenth amendment to the federal constitution. County of San Mateo v. Southern Pac. R. Co., 13 Fed., 722; County of Santa Clara v. Southern Pac. R. Co., 18 Fed., 385; Fraser v. McConway & T. Co., 82 Fed., 257; Indianapolis Gas Co. v. City of Indianapolis, *id.*, 245; Railroad Co. v. Ellis, 165 U. S., 150; 17 Sup. Ct., 255. Nor does it change the effect to say that the statute itself is valid, and that the error was one merely in the administration of the law. The injury is just the same. In Regan v. Trust Co., 154 U. S., 390; 14 Sup. Ct., 1051, the supreme court of the United States said in respect to this point:

"'Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge; and yet the officers

> charged with the administration of that valid tax law may so act under it, in the matter of assessment or collection, as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and, when they do so, the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts.' "

To the same effect see,

Scott vs. McNeal, 154 U. S., 34, 45.
Wright vs. Nagle, 101 U. S., 791, 794.
*Ex parte* Virginia, 100 U. S., 339, 346.

While this question is one of jurisdiction of the Court below, yet at the same time it is a broad constitutional question of far-reaching importance and in no way confined to the particular case at bar. The general doctrine laid down by the Court below is, that when the Governor of a State or any other officer or person is appointed by an act of the Legislature to do a particular thing, and does that particular thing in an unauthorized and improper manner, then the act of such appointee is not the act of the State, but of the individual, and that therefore, no Federal

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Court can take jurisdiction of a suit brought by a person deprived of his property without due process of law, by the improper conduct of an officer or person clothed with powers conferred upon him by a State.

We ask leave of this Court to present this question orally, believing that it is one of such importance that it would be difficult, if not impossible, to fully present it upon printed briefs alone, and we urge an early advancement of this cause (if oral argument is also granted) for the reason that since this cause was originally brought, the apprehensions of the appellant have been fulfilled, and within the last few weeks, the foundations of his house have begun to give way and the building has been condemned as unsafe by the Department of Buildings of the City of New York.

ARTHUR H. MASTEN,
MAXWELL EVARTS,
*Of Counsel for the Appellant.*